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No. 91-489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OMAHA INDIAN TRIBE, TREATY OF 1854, ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY; JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; OTIS PETERSON; DARRELL L., HAROLD, and IOWA DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEFS IN OPPOSITION OF RESPONDENTS STATE OF IOWA, ET AL; RESPONDENTS EDNA BOULDEN MILLER, ET AL.; AND RESPONDENTS AGRICULTURAL INDUSTRIAL & INVESTMENT COMPANY AND DONALD L. RUPP

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Petitioner Omaha Indian Tribe, respecting the Briefs in Opposition of Respondents State of Iowa, et al.; Respondents Edna Boulden Miller, et al.; and Respondents Agricultural Industrial & Investment Company and Donald L. Rupp, presents this single reply to those Oppositions.

That course is mandated for these reasons: (1) the issues presented by each of the Respondents are virtually identical and (2) Respondent State of Iowa's Brief in Opposition was not received until the afternoon of October 28, 1991, and Petitioner Tribe has been informed that, because this case goes to conference on November 1, 1991, this Reply must be filed with the Court early Wednesday, October 30, 1991.

OPINIONS BELOW

Petitioner Omaha Indian Tribe seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit,[1] affirming the judgment of May 29, 1990, dismissing with prejudice Petitioner Tribe's claim in the United States District Court for the Northern District of Iowa, Western Division.[2]

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit was rendered May 28, 1991; the order denying Petitioner Tribe's Motion for Rehearing *En Banc* was entered July 31, 1991 by an Order dated August 21, 1991; and the mandate was stayed until September 21, 1991 under further condition that the stay would be maintained if Petitioner Tribe filed its Petition for Certiorari by September 21, 1991. The court has jurisdiction pursuant to 28 U.S.C. Sec. 1254 (1).

SUMMARY OF REPLY TO RESPONDENT IOWA

These all-pervasive issues involving Petitioner Tribe's right under the Constitution to Judicial Due Process, fully set forth in the Tribe's petition for a writ of certiorari, have been intentionally avoided by *all* of the Respondents. These three questions emphasized in Tribe's petition are avoided and remain unanswered in Respondents' Briefs in Opposition:

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[1] Appendix F, p. 40a, *et seq. Omaha Indian Tribe v. Agricultural & Industrial Company, et al*, 933 F.2d 1462 (CA 8, 1991).

[2] Appendix A to Petition for a Writ of Certiorari, p. 1a, *et al.*

(1) Whether Petitioner Tribe is entitled to a full and fair hearing before a fair tribunal respecting Petitioner Tribe's charges that Myles E. Flint and Evan L. Hultman, attorneys in the Department of Justice, forced their fraudulent representation upon Petitioner Tribe and intentionally constricted to 1900 acres Petitioner Tribe's valid claims to title to 6390 acres in the Blackbird Bend Meander Lobe by either denying or abandoning Petitioner Tribe's valid claims to title to 4490 acres of land?

(2) Whether Petitioner Tribe, under the Due Process Provisions of the Constitution, being represented by counsel of its own choice, can have forced upon it the representation of Evan L. Hultman, United States Attorney, who prior to forcing his representation upon Petitioner Tribe had represented Respondent Iowa as its Attorney General in state court litigation with Respondents Lakin and RGP, Inc. involving precisely the same 6390 acres in the Blackbird Bend Meander Lobe?

(3) Whether Evan L. Hultman could properly force his representation upon Petitioner Tribe as United States Attorney in *United States v. Wilson*, he having previously represented Respondent Iowa in litigation with Respondents Lakin and RGP, Inc. involving precisely the same lands, in clear violation of Canon 9 of the Code of Professional Responsibility, which explicitly declares that Evan L. Hultman should not accept employment as an attorney under the circumstances and likewise in clear violation of an unbroken line of authorities condemning an attorney's connivance to sell out his client, here Petitioner Tribe?[3]

None of the Respondents' Briefs in Opposition consider Petitioner Tribe's Constitutional right to Judicial Due Process but seek to obfuscate, avoid, or circumvent those issues. For example, Respondent Iowa, as one of the principal issues set forth in its Opposition, presents this truly unprecedented statement:

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[3] Petition, p. 18, *et seq.*

II. THERE IS NO REASON FOR THIS COURT TO HEAR THE "FRAUD" ISSUE AS THAT ISSUE WAS NOT PROPERLY PRESERVED, HAS BEEN REPEATEDLY REJECTED AS FRIVOLOUS, AND WOULD NOT PROVIDE A GROUND FOR RELIEF FROM THE JUDGMENT, EVEN IF TRUE[4]

Irrespective of the shortage of time and space, Petitioner Tribe has the obligation separately to consider that statement by Respondent Iowa. Initially Respondent Iowa declares that the "fraud issue . . . was not properly preserved." It is respectfully urged to the Court that, when Petitioner Tribe sought "properly to preserve" the issue of fraud, Petitioner Tribe's quiet title action was dismissed with prejudice because of the "gag" order entered by the district court at the request of Respondent Iowa. The issue of the propriety of the "gag" order entered by the district court at the request of Respondent Iowa is comprehensively reviewed by Petitioner Tribe.[5]

Reference is next made to that phase of Respondent Iowa's above-quoted heading which declares that Petitioner Tribe's " 'fraud' issue . . . has been repeatedly rejected as frivolous." Ignored by that erroneous statement is the fact that both the district court and the Court of Appeals have repeatedly declared that the charges are "frivolous" while simultaneously denying Petitioner Tribe a full and fair hearing and suppressing all evidence respecting the fraud charges which are fully supported by uncontroverted affidavits.

Respondent Iowa completes the above-quoted statement with the declaration that the " 'fraud' issue . . . would not provide a ground for relief from the judgment, even if true." That grossly erroneous statement belies the dignity of Respondent Iowa as a dominant sovereign in the Union

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[4] Iowa's Opposition, p. 11.

[5] Petition, p. 13-14, para. (8), (9), (10), (11). *See*, also p. 16, reviewing the fact that the district court dismissed with prejudice Petitioner Tribe's quiet title action by reason of Tribe's insistence that the fraud issue be preserved for appeal.

of States. It is, moreover, incredible that Respondent State of Iowa would, in total desperation, urge that grossly irresponsible contention to the Supreme Court of the United States. That declaration approves the violation of Petitioner Tribe's right to Judicial Due Process and likewise denies Petitioner Tribe the safeguards provided by the property provisions of both the Fifth and Fourteenth Amendments to the Constitution.

It has been repeatedly held that fraud of the character here involved justifies a court setting aside a judgment irrespective of the lapse of time.[6] It has also been authoritatively declared that fraud strikes at the validity of a judgment, and "[t]he integrity of the judicial process demands no less."[7] The Court in its hallmark decision of *Hazel-Atlas Co. v. Hartford-Empire Co.*[8] denies that fraud can be condoned for its constitutes a tampering with the administration of justice and is in fact a wrong against the institutions themselves.

Respondent Iowa does not mention, much less deny, the all-pervasive conflict of interest of Evan L. Hultman who forced his representation upon Petitioner Tribe and constricted Petitioner Tribe's claims to 1900 acres, thus protecting his former client by denial of Petitioner Tribe's valid claims to title.[9]

Contrary to fact, Respondent Iowa declares that the complaint in *United States v. Wilson* pertained only to "trust lands."[10] That statement is incorrect. The complaint in *United States v. Wilson* pertained to all of the 2900 acres within the Barrett Meander Line. Plate II of Tribe's petition establishes—uncontroverted by Respondent Iowa—that "Respondent Iowa's Claimed Area 700 Acres" are

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[6] *Fiske v. Buder*, 125 F.2d 841, 849 (CA 8, 1942); *cert. den.* 273 U.S. (1942).

[7] *United States v. Shotwell*, 355 U.S. 234, 240-241 (1957).

[8] 322 U.S. 238, 246 (1944).

[9] Petition, p. 18, *et seq.*

[10] Iowa's Opposition, p. 11.

within the 2900 acres claimed in *United States v. Wilson.* Those 700 acres were illegally seized and taken from Petitioner Tribe by Evan L. Hultman as Attorney General for Respondent Iowa in amicable litigation with Respondents Lakin and RGP, Inc.[11] Hence, it is asserted—incredibly—that those 700 acres are not "trust lands." When Evan L. Hultman, as United States Attorney filed the complaint in *United States v. Wilson*, he denied Petitioner Tribe's title to the 700 acres of land and by that process fraudulently abandoned Petitioner Tribe's title to those 700 acres of land for the benefit of his former client Respondent Iowa.

Failure of the District Court to Consider Petitioner Tribe's December 5, 1989 Motion

On December 5, 1989 Petitioner Tribe requested the district court to set down for hearing Respondent Iowa's motion to dismiss.[12] In that December 5, 1989 motion—which remains pending in the district court today—Petitioner Tribe responded in detail to the misstatements made by Respondent Iowa to the district court.[13] There was likewise reviewed in depth the false charges of impropriety on the part of Petitioner Tribe in regard to the pretrial conferences which Petitioner Tribe was forced to attend irrespective of the fact that Magistrate Jarvey had, in grave error, precluded Petitioner Tribe from offering evidence in regard to all of the lands in the Monona and Mission Bends.[14] Reference is also made to Petitioner Tribe's repeated efforts to have the district court, Judge

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[11] For the record it is important that Respondent Lakin transferred to Respondent Wilson a substantial portion of the lands which he illegally seized from Petitioner Tribe in the Blackbird Bend Meander Lobe.

[12] Appendix X of Petition, p. 224a, 228a, *et seq.*

[13] *Ibid.*

[14] *Ibid, See* pages 257a-266a; *See* also Petition, p. 8, Certificate of Counsel reviewing the Order precluding Petitioner Tribe from offering evidence respecting its claims while forcing Petitioner Tribe to prepare a pretrial order respecting its claims.

Urbom presiding, to hear Petitioner Tribe's pending motions of December 5, 1989 and March 13, 1990.[15]

REPLY TO OPPOSITION OF RESPONDENTS EDNA BOULDEN MILLER, ET AL.,

There has been reviewed immediately above the consequences of the fraudulent representation forced upon the Tribe by Evan L. Hultman in the case of *United States v. Wilson.* In effect, Petitioner Tribe has been denied its day in Court respecting its valid claims to title in regard to the full 6390 acres within the Blackbird Bend Meander Lobe, which was the subject matter of Petitioner Tribe's quiet title action, *Omaha v. Agricultural, Edna Boulden Miller, et al.* This sequence is important for it establishes the forced, fraudulent representation. On January 26, 1976,[16] the district court, Judge McManus presiding, consolidated the pending case of *United States v. Wilson* with Petitioner Tribe's case and Petitioner Tribe was prepared to proceed to trial involving the full 6390 acres against all of the Defendants, including Respondents Edna Boulden Miller, *et al.* Acting *sua sponte*, on April 5, 1976, Judge McManus limited the trial of the issues in that case to the 2900 acres within the Barrett Meander Line, *United States v. Wilson.*

As a consequence Respondents Edna Boulden Miller, et al., were the beneficiaries of the Hultman fraud and likewise beneficiaries of the dismissal with prejudice of Petitioner Tribe's claims by Judge Urbom giving rise to Petitioner Tribe's seeking review in the Court.

Respondents Edna Boulden Miller, et al., were likewise beneficiaries of the refusal of the district court, Judge Urbom presiding, to hear Petitioner Tribe's motion of De-

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[15] Appendix Y, p. 284a, p. 288a, Petitioner Tribe's repeated efforts to be heard in response to issues giving rise to dismissal of Petitioner Tribe's claims with prejudice, and the denial of those requests to be heard.

[16] *Omaha v. Wilson*, 575 F.2d 620, 623-628 (CA 8, 1978). *See* Plates I-IV.

cember 5, 1989, in which Petitioner Tribe reviewed in explicit detail the fallacious character of the charges made by Respondents Edna Boulden Miller, *et al.*, seeking dismissal with prejudice of Petitioner Tribe's claims.[17] In that December 5, 1989 motion, which remains pending in the district court, the false and fabricated statements made by Respondent Edna Boulden Miller, et al., are reviewed and documented. It is most important that Respondent Edna Boulden Miller, et al., as reviewed by Petitioner Tribe, actively participated in all of the discovery processes and was fully aware of all aspects of Petitioner Tribe's valid claims throughout the area in litigation. As a consequence, Petitioner Edna Boulden Miller's response is clearly erroneous.

There has been presented for review to the Court the issue of whether Petitioner Tribe's valid claims, including the claims of Respondents Edna Boulden Miller, et al., could properly be dismissed with prejudice without permitting Petitioner Tribe fully to be heard in regard to the Tribe's documented responses to the false charges made by Respondents Edna Boulden Miller, *et al.*, and all other Respondents.[18]

Throughout the Opposition of Respondent Edna Boulden Miller, *et al.*,[19] references are repeatedly made to the fact that Petitioner Tribe was ordered by the Magistrate on June 6, 1990, to attend pretrial conferences and to prepare a pretrial order during the period in which Petitioner Tribe was subjected to a gravely-in-error order by the Magistrate precluding Petitioner Tribe from offering evidence relative to its claims to title to lands in Monona and Mission Bends. The subsequent reversal of the Magistrate's Order and the irreparable damage to Petitioner Tribe are fully reviewed and documented in Tribe's Petition.[20]

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[17] Appendix X to Petition for Writ of Certiorari, p. 225a-226a, 235a-247a; *See* Opposition Miller, pgs. 3, 6, 8.

[18] *See*, Petition, p. 8, *et seq.*, p. 14, *et seq.*; 19, *et seq.*

[19] Respondent Miller Opposition, p. 3, 12-13.

[20] Petition, p. 8, para. (2)(a),*et seq.*

REPLY TO OPPOSITION OF RESPONDENT AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY AND DONALD L. RUPP

The Court is requested by Respondent Agricultural, et al., harshly to impose sanctions ". . . against Petitioner and its Counsel for scandalous statements . . ."[21] in its Petition. Respondent's request to impose sanctions is at least consistent with Respondent's request for sanctions below, all of which were imposed without a hearing in violation of Petitioner Tribe's right to Judicial Due Process.[22]

Respondent Agricultural, while denying that it is subject to the fraud issue, nevertheless, extensively reviews the history of that fraud.[23] Petitioner Tribe denies that it failed in a timely fashion to assert the issue of fraud, which has been fully reviewed in Petitioner Tribe's reply to Respondent State of Iowa. It is, nevertheless, reiterated and reasserted that the Court of Appeals in the case of *Fiske v. Buder* and the Court's hallmark *Hazel-Atlas* decision established the principle that fraud of the character here involved vitiates a judgment predicated upon the fraud and can be raised at any time. It has likewise been declared that the power and authority of the courts to regulate the conduct of attorneys where fraud is involved ". . . cannot be defeated by the laches of a private party or complainant."[24]

Petitioner Tribe, in its December 5, 1989 motion, reviewed in depth the false and libelous statements of Respondent Agricultural in seeking to obtain the dismissal of Petitioner Tribe's claim.[25] For Respondent Agricultural to refer to Petitioner Tribe's ". . . blatant mockery of the

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[21] Opposition of Respondent Agricultural, p. (i); p. 15,III.

[22] Petition, p. 26, *et seq.*

[23] Agricultural Opposition, p. 3.

[24] *See*, Petition, p. 20-21.

[25] Appendix X to Petition, p. 224a, 227a, 247a-257a: "B. False Statement by Defendant Agricultural Respecting 'surprise.' "

discovery process by concealing the real basis for its claims in Monona Bend" is plainly and totally in error, all as reviewed by Petitioner Tribe in its December 5, 1989 motion. There Petitioner Tribe refers to the fact that Petitioner Tribe served "comprehensive interrogatories upon Respondent Agricultural which were not responded to in excess of a period of ten years."[26] In the December 5, 1989 motion, which was never heard by the district court, the stalling tactics by Respondent Agricultural underscored the fact that it was totally lacking in evidence to support its claim to title.

Respectfully submitted,

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October 30, 1991

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[26] *Ibid.*, p. 248a.